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Then I Saw the Contract, Now I'm A Believer: Why "Concept Groups" are "Works for Hire" and Cannot Invoke Statutory Termination Rights After 2013

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Then I Saw the Contract, Now I’m a Believer: Why “Concept Groups” are “Works for Hire” and Cannot Invoke Statutory Termination Rights After 2013

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I. INTRODUCTION

I look at my masters as something I created. The work for hire clause [in the Copyright Act of 1976] attempts to state that the record labels are the creators of these works, which is absurd. The artists create these works and they should own them. It’s as simple as that. I want to be able to pass them on to my kids. It’s part of their legacy.¹

Don Henley, The Eagles

1. Larry Rohter, *Don Henley Urges Artists to Know Their Rights*, N.Y. TIMES (Aug. 16, 2011, 8:00 AM) <http://www.artsbeat.blogs.nytimes.com/2011/08/16/don-henley-urges-artists-to-know-their-rights/?ref=donhenley>.

The relationship between musicians and record companies has been a mutually parasitic struggle for almost half a century.² New artists are desperate to sign on with a record company to produce and publish their music with the hope that they can catch the wave to stardom. Record companies do everything from holding “battle of the bands” contests to sending talent scouts across the country to find artists with the hope that they can sign the next big music sensation. Both musicians and record companies are dependent on each other for success.

When an artist writes and wants to record a song or album, the means of doing so come through the record company, who has the capital to access recording studios, high-quality equipment, and professionals in the field.³ In turn, a recording agreement is signed where the artist assigns the copyright in the sound recording to the record company so the song can be reproduced and sold.⁴ This means the artist retains no interest in the recording and generally only receives compensation for their work in royalty payments from the record company.⁵ When the perfect storm strikes and both artist and record company find success together, a number of questions are raised: Which party benefits from that success? How long can one party or the other benefit from the success? And what rights does each party have? These general inquiries eventually break down into some sensitive issues between artists and record companies.⁶

Congress attempted to clarify some of these issues in the Copyright Act of 1976, the last significant reconstruction of U.S. copyright law to date.⁷ One of the glaring changes that Congress made in the Act was the addition of the termination of transfer rights section.⁸ This change provides that an assignor of a copyright has the option to terminate the assignment thirty-five years after the execution of the grant occurred.⁹ This theoretically gives artists who assigned their music rights over to a record company during the initial contracting phase the opportunity to recapture those rights and once again make the music theirs.¹⁰

2. *Id.*

3. M. WILLIAM KRASILOVSKY & SIDNEY SHEL, *THE BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 14-15 (10th ed. 2007).

4. *Id.* at 27.

5. *Id.*

6. *Id.*

7. 17 U.S.C. § 1 (2006).

8. 17 U.S.C. § 203(a) (2006).

9. *Id.*

10. See Larry Rohter, *Record Industry Braces for Artists' Battles over Song Rights*, N.Y. TIMES, Aug. 15, 2011, available at <http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html?pagewanted=all>; Bill Gable, *Taking it Back: Terminations of*

One major exception to the termination rights in the Copyright Act is the "work made for hire" exception contained in § 203(a).¹¹ This provision states that a relationship determined to be a work made for hire is not entitled to the right to terminate a copyright assignment.¹² A sound recording is a work made for hire if it is "a work prepared by an employee within the scope of . . . employment" or "a work specially ordered or commissioned for use as a contribution" to a specific group of works further defined within the Copyright Act.¹³ While record companies will argue that the artists were "employees" hired to create songs and therefore the recordings were "works for hire," there are strong voices in the academic community that most "traditional" artist and record company relationships should not be categorized this way.¹⁴

On the other hand, when it comes to "non-traditional" artist and record company relationships, it is likely courts will apply the "work for hire clause" very differently. Bands such as The Monkees, the Village People, and The Spice Girls fall into a non-traditional class of artists because they are what are referred to as "concept groups."¹⁵ A concept group is a group that is formed mainly by independent record companies who, "perceiving an unfilled 'niche' in the entertainment market, hire a group to promote their 'concept,' or marketing idea. The record company owns the name and controls the product."¹⁶ These bands are a rare category of music performers because they are a group conceived and implemented by a Svengali¹⁷ manager, who controls all aspects of the group.¹⁸ Members are brought in

Copyright Transfers are Subject to the Exacting Statutory Framework of the 1976 Copyright Act, LOS ANGELES L., June 2008, at 34.

11. 17 U.S.C. § 203(a) (2006).

12. *Id.*

13. 17 U.S.C. § 101 (2006).

14. See generally William Henslee & Elizabeth Henslee, *You Don't Own Me: Why Work for Hire Should Not Be Applied to Sound Recordings*, 10 J. MARSHALL REV. INTELL. PROP. L. 695 (2011) (arguing that sound recordings are not works made for hire); Note, *Termination of Sound Recording Copyrights & the Potential Unconscionability of Work for Hire Clauses*, 30 REV. LITIG. 101 (2010) (arguing that applying the work made for hire clause to sound recordings would be unconscionable).

15. *Bell v. Streetwise Records, Ltd.*, 640 F. Supp. 575, 581 n.18 (D. Mass. 1986); see also Christopher R. Chase, *How the Band Protects Its Brand: The Use of Trademarks to Protect and Promote the Musical Artist*, INTELL. PROPERTY TODAY, Apr. 2007, at 35, 38.

16. *Bell*, 640 F. Supp. at 581 n.18.

17. "Svengali was the name of the villainous hypnotist in George Du Maurier's *Trilby* . . . Today the term is most often used to describe a 'person who, with evil intent, tries to persuade another to do what is desired.'" Julia R. McGuffey, Comment, *The New Edition of New Edition: Boybands, Trademarks, and Shifting Goodwill*, 47 U. LOUISVILLE L. REV. 167, 168 n.8 (2008) (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004), available at <http://dictionary.reference.com/browse/svengali>).

18. *Bell*, 640 F. Supp. at 581.

by a record company, given the material and a studio to record in, told what to record, where to record it, and what hours to work.¹⁹

This Note argues that, despite how courts rule when it comes to traditional artist and record company relationships with respect to the works made for hire exception, when it concerns a concept group, courts should find that the music recordings were indeed works made for hire and the artists are not subject to termination rights under the Copyright Act of 1976.²⁰

Part II outlines the history of U.S. copyright law and its evolution to what it is today. Part III takes a closer look at the termination rights section of the 1976 Copyright Act. Part IV will discuss the current state of the law when it comes to the works made for hire exception, while Part V will discuss concept groups compared to non-concept groups. Finally, Part VI will apply the framework in order to show why the works of concept groups will be found to be “works for hire” and therefore, the concept group’s artists will be unable to exercise termination rights under these circumstances.

II. HISTORY OF U.S. COPYRIGHT LAW

The legal definition of a copyright is “a limited duration monopoly.”²¹ The Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²² The first legislation passed by Congress to this effect was the Copyright Act of 1790,²³ which was based off of England’s Statute of Anne, created in 1709.²⁴ The Statute of Anne gave authors fourteen years of protection for their work before it fell into the public domain.²⁵ Similarly, the Copyright Act of 1790 provided a protection term of fourteen years from the date of publication with an option to renew the copyright in the fourteenth year for

19. Larry Rohter, *Village Person Tests the Copyright Law*, N.Y. TIMES (Aug. 16, 2011), <http://www.nytimes.com/2011/08/17/arts/music/village-people-singer-claims-rights-to-ymca.html?pagewanted=all>.

20. 17 U.S.C. § 203(a) (2002).

21. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 205 (7th ed. 2009).

22. U.S. CONST. art. I, § 8, cl. 8.

23. Act of May 31, 1709, 1 ch. 15, 1 Stat. 124.

24. 8 Anne, c.19 (1709); SHERRI L. BURR, ENTERTAINMENT LAW: CASES AND MATERIALS IN ESTABLISHED AND EMERGING MEDIA 59 (2011) (“By implementing the Statute of Anne, England produced a breakthrough against piracy that arose after the invention of the first printing press in 1450 by German Johannes Gutenberg and the second 26 years later by Englishman William Claxton.”).

25. *Id.*

an additional fourteen-year term.²⁶ Congress later extended the initial term to twenty-eight years, still renewable for fourteen years.²⁷

The Copyright Act of 1909, which replaced the Copyright Act of 1790, provided for a twenty-eight-year initial term followed by a possible twenty-eight-year renewal term that could be used by the original author or his/her heirs.²⁸ These rights were intended to be exclusive to the author.²⁹ If the author failed to renew the second term, the copyright expired and fell into the public domain.³⁰ This was also the first time that the established common law, which stated that "works made for hire" belonged to the employer, was codified.³¹ There was no specific definition of "works made for hire" included in the Act, nor did it address "commissioned works."³² The 1909 Act was and is applicable to all works published before 1978.³³ If an author wanted to sell or assign his or her copyright, he or she could do so for up to the entire fifty-six-year period, but then there was no way for the author or the author's heirs to regain control of the copyright unless the author died during the first twenty-eight-year term of the assignment.³⁴ In sum, anytime an emerging artist assigned the rights of their music to a record company under this Act, there was no way for the artist to get those rights back.³⁵

The Copyright Act of 1976, which replaced the Copyright Act of 1909, is the foundational piece of legislation for copyright law as it exists today.³⁶ This Act was enacted as a response to emerging types of technology and protects not only books, charts, and maps, but also photographs, motion pictures, sound recordings, and computer disks.³⁷ It constitutes a major overhaul of the preceding copyright laws.³⁸ The term of copyright protection was changed from a fixed number, twenty-eight-years, to a more

26. *E.g.*, 17 U.S.C. §§ 101-810 (2002).

27. *Id.*

28. An Act to Amend and Consolidate the Acts Respecting Copyright, Pub L. No. 60-359, §§ 23-24, 35 Stat. 1075, 1080-81 (1909).

29. *Id.*

30. *Id.*; *see, e.g.*, *Shaw Family Archives v. CMG Worldwide*, 2008 WL 4298548, at *3 (S.D.N.Y. 2008) (discussing how because Shaw failed to renew his copyright in June 1983, the registration expired and the book fell into the public domain, permitting anyone to use his images).

31. *Id.*

32. *Id.*

33. Copyright Act of 1909, Pub. L. No. 60-359, 35 Stat. 1075, *amended* by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (as amended and codified at 17 U.S.C. §§ 1-1332).

34. PASSMAN, *supra* note 21, at 303.

35. *Id.*

36. Copyright Act of 1976, 17 U.S.C. §§ 1-1332 (1976).

37. BURR, *supra* note 24, at 59.

38. PASSMAN, *supra* note 21, at 304.

fluid number—the life of the author plus fifty years for any works created after January 1, 1978.³⁹ The 1976 Act also extends the previous fifty-six year terms for works created before January 1, 1978 by nineteen years, for a total of seventy-five-years. Most importantly, this Act contains the termination of transfer rights section, which is discussed in greater detail in Part III.⁴⁰

In October 1998, Congress passed the Sonny Bono Copyright Term Extension Act, which amends the 1976 Act, and retroactively extends the term of copyright protection to the life of the author by seventy years.⁴¹ Additionally, this law extends the copyright protection term for works published before January 1, 1978, from the prior seventy-five years to ninety-five years.⁴² This Act applied directly to works already under copyright at the time the law was enacted.⁴³ The Extension Act also contains an exception that permits libraries, archives, and non-profit educational institutions to treat copyrighted works in their last twenty years of protection as if they were in the public domain for non-commercial purposes, under certain limited conditions.⁴⁴

In 2003, the Sonny Bono Copyright Term Extension Act was challenged in the case of *Eldrid v. Ashcroft*.⁴⁵ Eldrid alleged that this law was unconstitutional because in passing it, Congress overstepped its constitutional authority to control copyrights under Article 1, Section 8, Clause 8 of the U.S. Constitution.⁴⁶ Eldrid argued that the extension for works that already had durations placed on them and would otherwise have come into the public domain violated the “limited times” language in the Constitution.⁴⁷ It was further argued that the extension violated the constitutional free speech rights to the extent that it unreasonably extended the time before which such materials entered the public domain.⁴⁸ The Supreme Court rejected this argument, finding that “Congress acted within its authority and did not transgress constitutional limitations.”⁴⁹ The holding that Congress may retroactively increase copyright duration that it has already predetermined by statute puts increasing importance on the questions of if and when

39. 17 U.S.C. § 203(a) (2002).

40. *Id.*

41. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

42. *Id.*

43. *Id.*

44. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, sec. 104, § 108, 112 Stat. 2827 (1998).

45. *Eldrid v. Ashcroft*, 537 U.S. 186, 186-87 (2003).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 194.

artists can reclaim their rights in their music. Therefore, the Termination of Transfer Rights provision of the Copyright Act must be examined to determine its applicability to the artist and record company relationship.

III. TERMINATION OF TRANSFER RIGHTS IN THE COPYRIGHT ACT OF 1976

The Copyright Act of 1976 granted authors a new and exciting concept—the right of termination.⁵⁰ Generally, this right allows an author of a work who has sold or assigned the copyright to that work an opportunity to reclaim the work for their own exploitation.⁵¹ The way that Congress accomplished granting these rights was by dividing them into two categories that are based on the effective date of the 1976 Copyright Act: § 304(c), which applies to pre-1978 works, and § 203(a) for post-1978 works.⁵²

A. PRE-1978 WORKS: SECTION 304(C)

Section 304(c) applies the principles of the 1909 Copyright Act in order to give creators the right to terminate a grant of a copyright to a work they made.⁵³ As discussed previously, prior to the 1976 Act, copyright owners enjoyed a fifty-six year right to their creation before the work entered the public domain.⁵⁴ Therefore, § 304(c) gives artists an inalienable right to terminate a grant in a copyright after fifty-six years from the original grant date.⁵⁵

In order to terminate a grant under § 304(c), the author must serve advanced notice in writing to the grantee of the copyright, which must be signed by the author or the author's heirs.⁵⁶ The notice must state the effective date of the termination, and must be recorded in the Copyright Office before the effective date of termination.⁵⁷ The author has a five-year window to do this beginning when the fifty-six year term expires.⁵⁸ Additionally, the notice must be given not less than two and no more than ten years before the effective date of termination, which must be within the five-year

50. See 17 U.S.C. §§ 203(a)(3), 304(c) (2002) (detailing rights and conditions of copyright termination).

51. *Id.*

52. *Id.*

53. 17 U.S.C. § 304(c) (2002).

54. 17 U.S.C. §§ 101-810 (2002).

55. See 17 U.S.C. § 304(c) (2002) (detailing the artists' right to terminate a grant for a pre-1978 work).

56. *Id.* § 304(c)(4).

57. *Id.*

58. *Id.* § 304(c)(3).

window.⁵⁹ “It is important to note that a two-year advance notice is always required before the effective date, so that the five-year window is really only three years after the end of the 56th year.”⁶⁰ Furthermore, federal copyright rules do not apply to sound recordings originating in the U.S. before February 15, 1972, because “sound recordings” were not adopted until that date.⁶¹ As this Note will discuss, this means that § 304(c) termination right issues will not come before the courts until the year 2028 at the earliest, fifteen years after the first § 203(a) cases will be heard.

The pre-1978 termination rights allow the grantee to exploit the copyright for the length of time for which he bargained, putting emphasis on the contracting power between the parties. At the same time, it gives the author an option to invoke a reversionary interest so that he may also take advantage of the copyright extensions. In contrast, the mentality behind this provision differs significantly from the mentality behind the post-1978 provision and will be further explained in the next section.

B. POST-1978 WORKS: § 203(A)

Section 203 is the operative section for any work created after January 1, 1978.⁶² As mentioned above, the mentality for this provision is still focused on the contracting power between the parties, but further focuses on “safeguarding authors against unremunerative transfers.”⁶³ Congress recognized both that artists were frequently on poor bargaining ground when it came to initial dealings with record companies and that there were difficulties in speculating what a work’s value would be before it was commercially produced.⁶⁴ Section 203(a) provides an inalienable right of termination after thirty-five years from the date of publication.⁶⁵ Once thirty-five years have passed from the date the work was published, the author, or the appropriate heir if the author is deceased,⁶⁶ has a five-year window in which to serve notice to exercise the right, or the option is foreclosed and can never be raised again.⁶⁷ More importantly, these termination rights fail to be exercisable if artists’ work is found to be a work made for hire.⁶⁸ This im-

59. *Id.* § 304(c)(4).

60. KRASILOVSKY & SHEMEL, *supra* note 3, at 118.

61. *Id.* at 112.

62. 17 U.S.C. § 203 (2002).

63. H.R. REP. NO. 94-1476, at 124 (1976).

64. *See id.* (noting the need for a provision like § 203 because of the unequal bargaining position of authors caused by the impossibility of determining a work’s value until after it has been exploited).

65. 17 U.S.C. § 203(a)(3) (2002).

66. 17 U.S.C. § 203(a)(2) (2002).

67. 17 U.S.C. § 203(a)(3) (2002).

68. 17 U.S.C. § 203(a) (2002).

portant exception will be one of record companies’ strongest arguments in the post-1978 termination rights cases that will be brought in 2013.

IV. WORKS MADE FOR HIRE

A. STATUTORY REQUIREMENTS AND LEGISLATIVE HISTORY

The major exception to the termination rights provision under § 203 is the classification of a work as a work made for hire.⁶⁹ As mentioned above, “work for hire” is defined in § 101 of the Copyright Act of 1976 as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.⁷⁰

Works made for hire in the music context could potentially fall into either part of the definition; songs are created specifically because someone, usually a producer or record company, contracts to have the song or album prepared. They can do this either within the scope of employment or by commissioning the artist as an independent contractor to create the work.⁷¹ The policy rationale for this exception is based off of typical employer-employee relationships: that if someone hires someone else to create a work, the employer should benefit from the payment made to the employee.⁷² The way courts choose to apply the definition to situations involving musician/record company disputes will have a strong bearing on whether the works are found to be works for hire or not.⁷³

When it comes to sound recordings, for those trying to sort through whether they are works for hire under the 1976 Copyright Act, have only

69. *Id.*

70. 17 U.S.C. §101 (2002).

71. *Id.*

72. Scott K. Zesch, Annotation, *Application of “Works for Hire” Doctrine Under Copyright Act of 1976*, 132 A.L.R. FED. 301, 311 (1996).

73. See Larry Rohter, *Record Industry Braces for Artists’ Battles over Song Rights*, N.Y. TIMES (Aug. 15, 2011), <http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html?pagewanted=all>.

muddied waters more.⁷⁴ When analyzing whether or not sound recordings qualify as works for hire, courts must first determine whether Congress intended sound recordings to always be works made for hire.⁷⁵ The combination of two events in 1999 show both sides of the sound recording/work for hire coin.⁷⁶ First, in *Ballas v. Tedesco*, a federal district court in New Jersey found that sound recordings are not a works made for hire under the 1976 Copyright Act.⁷⁷ The court stated,

[T]he sound recordings are not a work for hire under the second part of the statute because they do not fit within any of the nine enumerated categories, and because there was no signed written agreement between the parties The definition does not provide that a sound recording standing alone qualifies as a work for hire under § 101(2).⁷⁸

This case serves as an important precedent for artists because it provides artists a place to hang their hats when it comes to invoking the termination rights outlined in the 1976 Copyright Act as a way to regain the control of their sound recordings (i.e. their songs and albums).⁷⁹ Additionally, it allows artists to argue that the nonappearance of “sound recordings” under the enumerated categories in the work for hire definition means that Congress did not intend their recordings to be works for hire.⁸⁰ This case does, however, potentially hurt artists who have signed valid written agreements which explicitly state that the recording is a work for hire, but overall *Ballas* can be viewed as a pro-artist case when it comes to the battle over song rights.⁸¹

Next in the evolution of work for hire jurisprudence was a pro-record company event that got a number of artists very angry.⁸² On November 26, 1999, during the last day Congress was in session, an amendment was added to a bill and subsequently passed without debate, stating explicitly that sound recordings were works for hire.⁸³ Congress had been persuaded

74. Henslee & Henslee, *supra* note 14, at 700-02.

75. *Id.*

76. *Id.*

77. *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

78. *Id.*

79. 17 U.S.C. § 203(a) (2002).

80. 17 U.S.C. § 101(2) (2002).

81. *Ballas*, 41 F. Supp. 2d 531.

82. See, e.g., Rohter, *supra* note 1 (discussing and interview with Don Henley when he and Sheryl Crow went to Washington in 1999 and 2000 to persuade Congress to undo language classifying sound recordings as “works made for hire,” which had been inserted stealthily into an unrelated bill).

83. Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-13, § 1011, 113 Stat. 1501 (1999).

by lobbying efforts of the Recording Industry Association of America (RIAA) to add this technical amendment, which amounted to much more than a technical amendment in the end.⁸⁴ The amendment essentially classified all sound recordings as works made for hire and granted full authorship rights to the record companies.⁸⁵ This amendment and the significant change its passage brought about was met with uproar from the musician and scholarly communities alike.⁸⁶ In fact, even Marybeth Peters of the Copyright Office appeared before Congress to testify that "[she did] not consider the recent amendment to have been a technical amendment. It changed existing law by *adding* sound recordings as a category of commissioned works which may be considered works made for hire."⁸⁷ Congress quickly repealed the amendment and restored the law to its former status, instructing courts to disregard the prior existence of the amendment and its repeal when determining the merits of future sound recording work for hire cases.⁸⁸ Congress' retraction of the amendment, followed by its instructions to the courts, imply that it was not Congress' actual intent to include sound recordings as works made for hire; although, it is difficult to conclude whether this was Congress' intent or whether it was simply trying to remedy the procedural negligence that occurred while enacting the amendment in the first place. Whatever the reason, the court's pro-artist ruling in *Ballas* and the inference that can be made from Congress' repeal of the amendment certainly seem to point toward the conclusion that sound recordings legally are not works made for hire.

84. Henslee & Henslee, *supra* note 14, at 702.

85. Section 1110(d) of the 1999 Act reads: "Work Made for Hire—Section 101 of title 17, United States Code, is amended in the definition relating to work for hire in paragraph (2) by inserting 'as a sound recording,' after 'audiovisual work.'" Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-13 app. I—S. 1948, § 1011(d), 113 Stat. 1501A-521, 1501A-544 (1999) (amending 17 U.S.C. § 101) (repealed 2000). According to press reports, this amendment, which clearly served the interests of record companies, was drafted and shepherded through Congress by a particular legislative aide, who, shortly after its adoption, accepted a position as a lobbyist for the RIAA. See Peter J. Strand, *What a Short, Strange Trip It's Been: Sound Recordings and the Work Made for Hire Doctrine*, 18 ENT. & SPORTS LAW. 12, 12 (Fall 2000).

86. Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, § 1011(d), 113 Stat. 1501A-521, 1501A-544 (1999) (amending 17 U.S.C. § 101) (repealed 2000) (according to press reports, this amendment, which clearly served the interests of record companies, was drafted and shepherded through Congress by a particular legislative aide, who, shortly after its adoption, accepted a position as a lobbyist for the RIAA).

87. *United States Copyright Office and Sound Recordings as Works Made for Hire: Before the Subcomm. On Courts and Intellectual Property of the H. Comm. On the Judiciary*, 106th Cong. 81 (2000) (statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress) (emphasis added).

88. Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (2000).

B. *COMMUNITY FOR CREATIVE NON-VIOLENCE V. REID*

In an attempt to clarify the work for hire confusion, the United States Supreme Court laid out a test for determining whether something is a work for hire in the seminal case *Community for Creative Non-Violence v. Reid*.⁸⁹ Community for Creative Non-Violence (CCNV), the petitioner, is a Washington D.C. based not-for-profit organization that advocates for rights of the homeless and is dedicated to eliminating homelessness in America.⁹⁰ Reid is a Baltimore artist who CCNV retained to produce a sculpture that would depict the plight of the homeless and be displayed at the annual Christmas-time Pageant of Peace in the District of Columbia.⁹¹ Both parties agreed that CCNV would pay the \$15,000 to build the sculpture, not including Reid's services, which he offered to donate.⁹² The dispute arose over the copyright to the finished sculpture.⁹³

The Court began by quoting Professor Nimmer and discussing how classifying a work as "made for hire" not only determines the initial ownership of its copyright, but also the copyright's duration, § 302(c); the owners' renewal rights, § 304(a); termination rights, § 203(a); and right to import certain goods bearing the copyright, § 601(b)(1).⁹⁴ After an extensive combing of the legislative history of the 1976 Copyright Act, the Court interpreted the § 101 work for hire language and established a test to determine whether the sculpture was a work "made for hire" that CCNV owned.⁹⁵ The test is based on the general common law of agency and examines the hiring party's right to control the manner and means by which the product is accomplished.⁹⁶ This analysis calls for a determination of whether the work was created within the employment relationship under § 101(1) or by an independent contractor under § 101(2) of the 1976 Copyright Act.⁹⁷ Since no definitions of "employee" or "scope of employment" are given in the Act, the Court imputed the common law agency definitions from the Restatement (Second) of Agency.⁹⁸ Among the factors outlined by the Court to be weighed when deciding whether the work was created by an employee or independent contractor were:

89. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (laying out factors that should be used when determining whether something is a work for hire).

90. *Id.* at 733.

91. *Id.*

92. *Id.* at 734.

93. *Id.*

94. *Cnty. for Creative Non-Violence*, 490 U.S. at 737. See 1 M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* § 5.03[A], at 5-10 (1988).

95. *Cnty. for Creative Non-Violence*, 490 U.S. at 751.

96. *Id.*

97. *Id.*

98. *Id.* at 752 (citing the *RESTATEMENT (SECOND) OF AGENCY* § 220(2) (1958)).

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party No one of these factors is determinative.⁹⁹

If the answer to the employment question is "yes," then the court must determine whether the work was created within the scope of employment. The Restatement uses a three-part test to determine if something was prepared within the scope of employment. A work is within the scope of employment if "(1) it is of the kind [the employee] is employed to perform; (2) it occurs substantially within the authorized time and space limits [of the employment]; [and] (3) it is actuated, at least in part, by a purpose to serve the [employer]."¹⁰⁰ The employer has the burden to prove that these three elements are met.¹⁰¹ If a work is not created within the scope of employment, it is most likely not a work made for hire.¹⁰²

If the answer to the employment question is "no," and therefore the work was created by an independent contractor under §101(2), three requirements must be met for the work to be considered work for hire: (1) it has to fall into one of the nine categories listed, (2) the work must have been specially ordered or commissioned, and (3) there must be a written agreement between the parties stating that the work was a work for hire.¹⁰³ Section 101 was implicated by the 1999 technical amendment that was added and then promptly repealed in 2000.¹⁰⁴ Once again, Congress' repeal of this amendment implies that Congress does not intend sound recordings to automatically be works made for hire.

After applying the above factors to the case at hand, the Supreme Court concluded that Reid was not an employee of CCNV and, therefore,

99. *Id.* at 751-52 (footnotes omitted).

100. RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

101. *See City of Newark v. Beasley*, 883 F. Supp. 3d (D.N.J. 1995).

102. *Id.*

103. 17 U.S.C. § 101(2) (2006).

104. Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, § 1011(d), 113 Stat. 1501A-521, 1501A-544 (amending 17 U.S.C. §101) (repealed 2000).

was an independent contractor.¹⁰⁵ The Court stated the only factor that weighed in favor of employment was the fact that CCNV members directed enough of Reid's work to make sure that he produced a sculpture that met their specifications, but that this factor alone is not dispositive.¹⁰⁶ Other factors, such as Reid supplying his own tools, working in his own studio, the short two month duration of the work, Reid's absolute freedom for when and how long to work on the project (outside of the deadline for completion), Reid's discretion for hiring and paying assistants, and the fact that CCNV did not pay any benefits to Reid all weighed against a finding of employment.¹⁰⁷ Since the sculpture was not found to have been created through an employer-employee relationship under the first part of the definition, the Court then turned to the second part of the definition and found that the sculpture did not fall into one of the nine enumerated categories.¹⁰⁸ Therefore, CCNV was not the author of the sculpture and had no rights to it under § 101 of the Copyright Act of 1976.¹⁰⁹

C. OTHER CASE LAW

Courts since *Community for Creative Non-Violence v. Reid* have further explored the work for hire clause and made a variety of findings pertinent to the analysis of whether sound recordings fall into the work for hire classification.¹¹⁰

In *Playboy Enterprises, Inc. v. Dumas*, the Second Circuit considered the work for hire clauses in both the 1909 Copyright Act and the 1976 Copyright Act.¹¹¹ Playboy magazine brought this action against artist Patrick Nagel, arguing that Playboy was the sole owner of paintings that it had hired Nagel to create for the publication.¹¹² Nagel created over 285 works for Playboy between 1974 and 1984.¹¹³ At the outset, Nagel was given specific instructions by Playboy as to the content of the paintings so they could be paired with specific articles.¹¹⁴ Beginning in 1978, Playboy stopped giving Nagel specific instructions and instead resorted to a system where

105. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752-53 (1989).

106. *Id.* at 752.

107. *Id.*

108. *Id.* at 752-53.

109. *Id.*

110. *See, e.g., Playboy Enter., Inc. v. Dumas*, 53 F.3d 549 (2d Cir. 1995); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003); *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004).

111. *Playboy Enter., Inc.*, 53 F.3d at 553.

112. *Id.* at 552.

113. *Id.*

114. *Id.*

Nagel submitted one painting a month of his choosing, giving him greater freedom to paint.¹¹⁵ All checks paid to Nagel were stamped with a legend on the back that stated certain terms.¹¹⁶ The checks sent for works before 1978 (Legend A) had no work for hire clause, but all of the checks after 1978 (Legend B) contained a clause stating that Nagel "acknowledges payment in full for services rendered on a work-made-for-hire basis . . . and confirms ownership by Playboy Enterprises, Inc. of all right, title, and interest . . . including all rights of copyright, in and to the Work."¹¹⁷ These checks were the only writings signed by Nagel relating to Playboy's ownership of the copyrights in the works.¹¹⁸

The Second Circuit found that the works created before 1978 were works made for hire based on the "instance and expense" test used by courts under the 1909 Copyright Act since Playboy paid for all of the works and Playboy had the right to control or supervise their creation.¹¹⁹ For the works created after 1978 under the 1976 Copyright Act, the court used the three-factor test set out in *CCNV* since Nagel qualified as an independent contractor and not a Playboy employee.¹²⁰ The parties stipulated that Playboy magazine was a "collective work" and, therefore, fell into one of the nine enumerated categories under § 101(2).¹²¹ The court then found that the "Legend B" writings on the back of the checks were sufficient evidence that the parties agreed before the creation of each work that it would be made for hire because they contained sufficient explicit language that Nagel implicitly agreed to when he deposited the checks.¹²² Finally, the court remanded the issue of whether the works were specifically ordered or commissioned by Playboy.¹²³ Before remand, the court concluded that this prong of the analysis has essentially the same meaning as the instance and expense test employed in pre-1978 work for hire situations.¹²⁴ The court further rejected the argument that Playboy must have exercised "actual control" over the characteristics of Nagel's work, stating that the "actual control" test had been explicitly rejected by the U.S. Supreme Court as being outside the scope of the statutory language of the 1909 Copyright Act.¹²⁵

115. *Id.*

116. *Playboy Enter., Inc.*, 53 F.3d at 552.

117. *Id.*

118. *Id.* at 552-53.

119. *Id.* at 555.

120. *Id.* at 558-63.

121. *Playboy Enters., Inc.*, 53 F.3d at 558.

122. *Id.* at 560.

123. *Id.* at 563.

124. *Id.* at 562.

125. *Id.* at 562; *see* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (overturning *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984), *cert. denied*, 469 U.S. 982 (1984)).

The court's findings here are important because they provide consistency and carryover of prior work for hire analysis to this prong of post-1978 work for hire analysis.¹²⁶ Additionally, the rejection of the "actual control" test potentially makes it easier for record companies to argue that musicians' songs are works for hire because it does not require the companies to prove that they exercised actual control over the production process.¹²⁷

Another case that discusses works made for hire is *Warren v. Fox Family Worldwide, Inc.*¹²⁸ Warren entered into a set of written agreements with Fox Family Worldwide and MTM Productions where Warren would create music for a television show called *Remington Steele* in return for compensation from MTM.¹²⁹ The suit arose because Warren claimed that MTM and Fox breached their obligations under the contracts to pay royalties for the use of the compositions and that MTM and Fox infringed Warren's copyrights in the music by continuing to broadcast and license the series after materially breaching the contracts.¹³⁰ The essence of Warren's copyright infringement claim was that when MTM and Fox breached their agreement by not paying full royalties, the copyright in the songs reverted back to him. By broadcasting the show, including the Warren songs, without his authorization, MTM and Fox infringed on his copyrights.¹³¹

The Ninth Circuit began its analysis by discussing the effect copyright ownership has on works made for hire.¹³² While copyright ownership vests initially in the authors of the work, the very nature of a work made for hire is that "the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."¹³³ The court held that although Warren was not an employee of MTM or Fox, the agreements the two parties signed "illustrate[d] an express agreement that the works in question were specially commissioned as works for hire" and, therefore, MTM and Fox were the original authors of the work and possessed all rights to the works under law.¹³⁴ The court stated that it did not matter that the agreements themselves never stated the talismanic words "specially ordered or commissioned" because there is no requirement by the 1976 Copyright Act or case law that

126. See *Playboy Enters., Inc.*, 53 F.3d at 558.

127. *Id.*

128. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003).

129. *Id.* at 1138.

130. *Id.*

131. *Id.*

132. *Id.* at 1140.

133. 17 U.S.C. § 201(b) (2006), construed in *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d at 1140.

134. *Warren*, 328 F.3d at 1140.

work for hire contracts include specific wording.¹³⁵ The court further stated that it did not matter that the contracts were entitled "Music Employment Agreement" and not "Work-For-Hire Agreement" because nothing in the Copyright Act of 1976 or case law indicates that an agreement's title is dispositive.¹³⁶ These are high-implication conclusions because they show how little wiggle room there is for individuals who contract as an independent contractor to create a work made for hire.¹³⁷ Most importantly, the court makes it clear that the party for whom the work is prepared gets initial vesting of all rights of authorship and copyright when a work for hire is specifically contracted for, leaving any hope for assignment or beneficial ownership arguments outside the scope of the issue.¹³⁸

A final case addressing work for hire clauses is *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*¹³⁹ In this case, an heir to Martha Graham's estate brought an action for enjoinder against a dance center and school where Graham had been an employee to determine ownership of copyright for dances created by Graham during her employment and ownership of related costumes and sets.¹⁴⁰ Protas, the heir, sought judgment that none of the dances were in the public domain, that he owned all the rights in the dances, and that the Martha Graham School and Dance Foundation (Protas' school) was the current and authorized licensee of the rights.¹⁴¹ The Center of Contemporary Dance argued that the dances, sets, and costumes belonged to the Center because they were created "by virtue of the work for hire doctrine" and, therefore, were not Graham's to pass down at her death.¹⁴²

In the pertinent part of the opinion, the court looked at the dances Graham created after January 1, 1978 using the common law agency test laid out in the *CCNV* case to determine that the dances Graham created indeed were works for hire.¹⁴³ The court began by noting that one's status as an employee renders a work created within the scope of employment as a work for hire, meaning "the copyright belongs to the employer (in the absence of a contract providing otherwise)."¹⁴⁴ Going through the *CCNV* factors, the court gave significance to the fact that Graham received employee benefits

135. *Id.* at 1141.

136. *Id.*

137. *Id.* at 1145.

138. *Id.*

139. *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004).

140. *Id.* at 629-32.

141. *Id.*

142. *Id.*

143. *Id.* at 635-636 (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)).

144. *Martha Graham Sch. & Dance Found., Inc.*, 380 F.3d at 636.

and reimbursement for personal expenses, travel, and medical benefits, a regular salary, and that the Center withheld income and social security taxes from her salary.¹⁴⁵ Additionally, Graham created the dances on the Center's premises and with the Center's resources, and her choreography was also the regular activity of the Center.¹⁴⁶ As the court did in *Playboy*,¹⁴⁷ it again held that "actual control" was not a dispositive factor against a work for hire conclusion and that the fact that the Center did not exercise much control over Graham did not mean she was not an employee where other factors weighed heavily in favor of finding an employer-employee relationship.¹⁴⁸ The court elaborated on this by stating that since Graham's exceptional talent understandably explains the Center's disinclination to exercise control over her work; there are many occupations in which the employer would not normally exercise control over the details of the employee's work.¹⁴⁹ These conclusions by the court are important because they show how subjective the balancing process between the various factors is when it comes to determining whether someone is an employee or an independent contractor. One must look closely at all of the factors and weigh them in comparison to the others; one factor alone is not dispositive.

V. CONCEPT GROUPS

It is the distinctive nature of concept groups in the music world that makes them especially unique compared to more traditional artists. Concept groups are a particular class of musician who are created by a "producer, promoter, or manager who (essentially) hires [them] to play roles in the group and directs the group's performances."¹⁵⁰ Where the traditional artist-producer relationship is built from the ground up, the concept group could be said to be built from the top down. Traditional relationships start with the artist signing a record deal with a producer or record company who agrees to front the money for studio time so the artist can record his or her music in exchange for the rights to the songs once created.¹⁵¹ In contrast, a concept group is generally formed by the creator envisioning a mold of the ideal group makeup and then hiring people to fill that makeup.¹⁵² The producer or manager essentially creates "slots" to fill the group; they control

145. *Id.* at 641.

146. *Id.*

147. *Playboy Enters., Inc v. Dumas*, 53 F.3d 549, 562. (2d Cir. 1995).

148. *Martha Graham Sch. & Dance Found., Inc.*, 380 F.3d at 642.

149. *Id.*

150. Chase, *supra* note 15, at 35.

151. MICHAEL FINK, *INSIDE THE MUSIC BUSINESS: MUSIC IN CONTEMPORARY LIFE* 30 (Schirmer Books ed. 1989).

152. Chase, *supra* note 15, at 35.

the quality of the goods and services associated with that group and direct the artists in what roles to play and what music to write.¹⁵³ The creator of a concept group generally recruits the members of the group through auditions, then puts up money for them to take vocal and performing lessons, make recordings, and tour.¹⁵⁴ The creator gives the group its name, its image, and its subjects, as opposed to the traditional relationship where the artist has control over these aspects.¹⁵⁵ Examples of such non-traditional groups include Village People, New Kids on the Block, The Monkees, Spice Girls, Backstreet Boys, and N'Sync.¹⁵⁶ A recent spin on the creation of concept groups stems from many reality television shows that are designed to create these concept groups, such as American Idol and Making the Band.¹⁵⁷ The nature of these concept groups has spawned legal debate in many areas, especially in the realm of trademark law.¹⁵⁸

A. TRADEMARK CONSIDERATIONS

Courts' treatment of concept groups when it comes to trademark law has major implications for potential litigation when it comes to copyright issues. While trademark law is a different branch of law from copyright law, similar goals and policy considerations underlie both of these when it comes to intellectual property law.¹⁵⁹ A trademark is a word, phrase, symbol, design, or combination thereof that identifies and distinguishes the source of the goods of one party from those of another.¹⁶⁰ It allows customers to identify the origin or source of goods and distinguish between competing products or services in order to avoid confusion in the marketplace.¹⁶¹

In the seminal case *Bell v. Streetwise Records, Ltd.*, a Massachusetts court held that the trademark to a concept group's "name belongs to the person or entity that conceived both concept and name."¹⁶² Both sides in the dispute, the manager and the band members, sought a preliminary injunction to prevent the other from using the name New Edition.¹⁶³ The court ruled in favor of the band members, saying that the group was not a concept

153. *Id.*

154. McGuffey, *supra* note 17, at 181.

155. *Id.* at 181.

156. Chase, *supra* note 15, at 35.

157. *See id.*

158. *See Bell v. Streetwise Records, Ltd.*, 640 F. Supp. 575, 581 (D. Mass. 1986); *see also* McGuffey, *supra* note 17, at 181; Chase, *supra* note 15.

159. *See BURR*, *supra* note 24, at 806.

160. *Id.* at 807.

161. *Id.*

162. *Bell*, 640 F. Supp. at 581.

163. *Id.*

group because the members chose their band name and performed together more than a dozen times before ever meeting the alleged creator of the group.¹⁶⁴ The court further described concept groups in a footnote, focusing primarily on the business relationship present in these types of groups where the record company owns the name and controls the product, yet found that the band did not fit this mold for the reasons stated above.¹⁶⁵ Although New Edition was determined not to be a concept group in this case, the court's definition of a concept group is important because if a group is found to be a concept group, there is a presumption that the creator of the group owns the trademark rights to the name.¹⁶⁶ This primarily has to do with the idea of control; because the creator exerts significant control over the creation and management of the concept group, the creator therefore, should own the trademark rights to that concept.¹⁶⁷

While not yet explicitly stated by any court, the concept group analysis for trademark ownership seems to be based on principles at work similar to the work made for hire test outlined by the Supreme Court in *CCNV*.¹⁶⁸ Both look to the nature of the relationship between the parties for guidance and although the work made for hire test has less rigid requirements than the trademark ownership test in *Bell*, the parallels between the two seem to lend themselves to similar analysis that could carry over from one to the other.¹⁶⁹ Further, even though the court in *Playboy Enter., Inc.* said that actual control was not a dispositive factor in the work made for hire analysis, it is still an important consideration in both the work made for hire and trademark ownership analysis.¹⁷⁰ Since there is no case law concerning the post-1978 termination rights under the 1976 Copyright Act, the similarity of trademark ownership analysis for concept groups will be an important tool when courts determine whether an artist or a record company retains the rights to music recorded during a relationship.

VI. CONCEPT GROUPS ARE WORKS MADE FOR HIRE UNDER THE 1976 COPYRIGHT ACT

With the calendar approaching 2013 and the courts already receiving filings for suits by artists invoking their statutory termination rights to reclaim their songs, this is bound to be a hotly contested issue.¹⁷¹ Among

164. *Id.*

165. *Id.* at 581 n.18.

166. *Id.* at 581.

167. *Bell*, 640 F. Supp. at 581.

168. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

169. *Bell*, 640 F. Supp. at 581.

170. *Playboy Enter., Inc. v. Dumas*, 53 F.3d 549, 558 (2d Cir. 1995).

171. *See* Rohter, *supra* note 10.

some of the first will be traditionally-situated artists such as Billy Joel, Bruce Springsteen, and the Eagles.¹⁷² Although it is unclear where the law stands on these artists' song rights, many believe that courts will find in favor of the artists when all is said and done.¹⁷³ Briefly, these conclusions are mostly founded on the fact that the traditional artist has the right to control the creative process, the artist possesses the unique skill to make hit records, the contracts generally do not say the recordings are works made for hire, and the artist typically receives payment for the songs through royalties, all parts of the *CCNV* test that weigh in favor of an independent contractor relationship.¹⁷⁴ Further, the legislative history indicates that the assignment of traditional recordings should be found to be subject to the right of termination.¹⁷⁵ Specifically, Congress' revocation and abolishment of the technical amendment adding sound recordings to the list of exceptions in 2000 favors artists in their struggle to reclaim their recordings.¹⁷⁶ It is likely that the results of many of the cases that go to litigation will hinge on specific contractual language between the artist and the record company. Regardless of how the courts decide the termination rights issue when it comes to traditional artists, this Note's primary concern is with the application of these rights to non-traditional situations, namely concept groups.

As discussed above, concept groups have a completely different kind of relationship than the traditional artist-record company relationship. These are not groups that previously performed together and impressed the record company enough that the company offered them a deal.¹⁷⁷ These are groups that were created by a record company, manager, or producer, filled with artists, and then trained to be the type of group the creator envisioned.¹⁷⁸ For example, The Village People are such a band whose lead singer, Victor Willis, filed papers to regain control of his share of the songs that the band recorded after 1978 such as "Y.M.C.A." and "In the Navy."¹⁷⁹ The record companies opposing Willis' claim, Scorpio Music, a French business, and Can't Stop Productions, one of its American affiliates, do not deny that Willis is one of the writers of the songs, but instead allege that

172. *Id.*

173. *See* Henslee & Henslee, *supra* note 14.

174. *Id.* at 710-12 (discussing the factors that weigh in favor of the artist when determining whether traditional artists' songs are works made for hire).

175. H.R. Rep. No. 94-1476, at 124 (1976).

176. Section 1011(d) of the 1999 Act reads: "WORK MADE FOR HIRE.—Section 101 of title 17, United States Code, is amended in the definition relating to work for hire in paragraph (2) by inserting 'as a sound recording,' after 'audiovisual work.'" Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113 app. I. 1948, §1011(d), 113 Stat. 1501A-521, 1501A-544 (amending 17 U.S.C. §101) (repealed 2000).

177. Chase, *supra* note 15, at 38.

178. *Id.*

179. Rohter, *supra* note 19.

Willis and the other band members were workers for hire, because The Village People were a concept group by definition.¹⁸⁰ After applying both the work made for hire test outlined by the Supreme Court in *CCNV* and the similar trademark ownership principles to concept groups, it is likely that concept groups will indeed be found to be works made for hire and, therefore, such artists will be prevented from invoking the statutory termination rights under existing copyright law.¹⁸¹

A. THE CCNV TEST

As previously noted above, the *CCNV* test laid out by the Supreme Court follows common law agency principles in order to determine whether a work was created by an independent contractor or as part of an employer-employee relationship.¹⁸² The factors used in the test are:

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party No one of these factors is determinative.¹⁸³

Additionally, case law after *CCNV* stated that the exercise of "actual control" by alleged employer is not a requirement for finding a work for hire relationship.¹⁸⁴ Applying these factors to a concept group, courts will likely find that they weigh in favor of the record company or creator of the group.

First and most importantly, although not dispositive, it is the creator's right to control the manner and means in which the recordings are made.¹⁸⁵ This factor weighs heavily in favor of the producer, promoter, manager, or record company who created the group. It combines parts of the *CCNV* test

180. *Id.*

181. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989); Bell v. Streetwise Records, Ltd., 640 F. Supp. 575, 581 (D. Mass. 1986).

182. *Cmty. for Creative Non-Violence*, 490 U.S. at 752.

183. *Id.* at 751-52.

184. *E.g.*, Playboy Enter., Inc. v. Dumas, 53 F.3d 549, 562 (2d Cir. 1995).

185. *See* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 642 (2d Cir. 2004).

such as the nature of the relationship between the parties, the source of the instrumentalities, and the discretion on when and where to work.¹⁸⁶ When it comes to concept groups, the creator will have a majority of the control over every facet of a group, especially in its early stages of formation. Since these groups are formed with a specific vision in mind in order to fill a perceived "niche" in the entertainment market, those that are brought in to fill the group will be required to conform to the requests of the creator so that vision may be achieved.¹⁸⁷

When a group like this is formed, the creator will likely hold auditions to find group members and then require the members to take vocal, performing, and other lessons to prepare them to play the part in the group they were brought in to play.¹⁸⁸ Further, the creator will likely have a heavy influence over the types of songs the band writes, give them specific subjects to write songs about, or even have them perform already written songs.¹⁸⁹ Unlike traditional artists, who usually provide their own instruments and tools used to produce a recording, concept group members generally bring nothing to the table but themselves.¹⁹⁰ The creator will book studio time, provide the equipment for recordings, and even serve in general managerial capacities.¹⁹¹ The high-level of control that the concept group creator exercises over creation and management of the group goes a long way toward finding that the creator is the employer of the employee-artists.

Second, the skill required to write and perform in a concept group is likely less than that which would be required for a traditional artist who is hired solely for their musical talent. Concept groups, are by their nature, groups that require members to possess both a minimal level of musical talent as well as fit a certain look.¹⁹² The court in *Bell* noted that at the onset, members of a concept group may lack many of the skills required in the performing arts.¹⁹³ In that case, the performers had "no [musical] training to speak of; none could read or write music. . . . [The creator] had to teach the thirteen-year-old group members everything"¹⁹⁴ The performers even had to "lip-synch" their live performances to a pre-recorded track.¹⁹⁵ As the relationship progresses, the artists' skill should gradually rise as the artists get more comfortable playing the role that the creator requested. While this

186. *Cnty. for Creative Non-Violence*, 490 U.S. at 751-52.

187. *Bell v. Streetwise Records, Ltd.*, 640 F. Supp. 575, 581 n.18 (D. Mass. 1986).

188. *McGuffey*, *supra* note 17, at 181.

189. *Id.*

190. *Id.* at 178-81.

191. *Id.*

192. *Id.*

193. *Bell v. Streetwise Records, Ltd.*, 640 F. Supp. 575, 579 (D. Mass. 1986).

194. *Id.* at 578.

195. *Id.* at 579.

factor will vary case by case depending on the concept and the type of people brought in to fill a group, it is likely that most who are hired to fill roles in a concept group will be hired more often because they fit the type of performer the creator is looking for and less due to their musical talent.¹⁹⁶

Next, courts have held that work as part of the regular business of the hiring party is highly likely to be ruled the property of the record label.¹⁹⁷ It is indisputable that record labels, managers, and producers are in the music business and work to develop artists and their works.¹⁹⁸ The courts will most likely find that concept groups, as musical recorders and performers, fall within the regular business of the hiring party as long as the hiring party has conducted business previously within the music industry.

The method of payment is the final factor that can be generally discussed without delving into specific contracts between the parties.¹⁹⁹ This factor will likely be similar but not identical between both traditional and non-traditional artists. Traditional artists generally receive advances from the record companies for their recording and album costs.²⁰⁰ In return, the record company withholds part of the royalty payments due as a result of record sales in order to recuperate the amount of the advance.²⁰¹ For concept groups, the creator will usually just pay outright for the recording and album costs instead of technically “loaning” the costs to the artist to be paid back later through record proceeds.²⁰² Then the artist will be compensated by the creator through royalties based on the success of the records and performances.²⁰³ While this distinction may seem negligible, it highlights the fact that when it comes to a creator-artist relationship in a concept group, the creator only pays royalties to the artist similar to a salary, never giving the artist anything beyond what they have earned.

After putting the majority of the factors from the *CCNV* test together in the context of concept groups, the distinction between traditional artists and non-traditional artists becomes much clearer. The argument that traditional artists recordings were not works made for hire, the fact that the creator of a concept group exercises the majority of the control over the artists, the skill required of the artists is low, the creator regularly works in the business, and the methods of payment show more control by the creator, all work in favor of concept group artists being employees of the creator. After

196. See, e.g., *Bell*, 640 F. Supp. 575.

197. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

198. JEFFREY A. HELEWITZ & LEAH K. EDWARDS, ENTERTAINMENT LAW 250-56 (2004).

199. *Cnty. for Creative Non-Violence*, 490 U.S. at 752.

200. KRASILOVSKY & SHEMEL, *supra* note 3, at 19-23.

201. *Id.*

202. Rohter, *supra* note 19.

203. *Id.*

a careful balancing of the *CCNV* factors, courts are likely to find that concept group artists are merely employees of the group creator and that their works are indeed works made for hire, barring their statutory termination right claims.²⁰⁴

B. TRADEMARK LAW APPLIED TO CONCEPT GROUPS

Other important considerations that favor an employer-employee relationship for concept groups are the legal findings in the area of trademark law.²⁰⁵ These findings are especially important because although they stem from a different specific area of law, they are rooted within the same general field of intellectual property law.²⁰⁶ Therefore, they share similar overall goals and policies, making it more likely that one can be applicable to the other. In *Bell*, the court defined a concept group in a way that presumes the creator of the group owns the trademark rights to the group's name.²⁰⁷ The court used the notion of control to justify its logic, saying that the creator who comes up with a name and a concept, finds and pays people to fill that concept, then organizes means of promoting that concept through records and performances, should retain the rights to the trademark in that concept.²⁰⁸ Applying that same logic instead in a copyright case yields a similar conclusion—a creator who comes up with a name and a concept, hires employees to fill that concept, and controls the various facets of their involvement in that concept should retain the rights to the outcome of that concept.²⁰⁹ In the absence of case law pertaining to post-1978 copyright termination rights, this is a logical comparison that courts can and should make. This is simply a different way to reach the same conclusion that artists who are part of concept groups are employees who were hired in order to see through the ideas of the original creator.

VII. CONCLUSION

There has been confusion surrounding music recordings, copyright assignment, and assignment termination since the legislation was passed back in 1976.²¹⁰ Should Congress do nothing to alleviate the confusion before 2013 arrives, this mess will be left up to the courts to untangle. The artists' right to terminate a copyright assignment to either renegotiate a contract or

204. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

205. *See Bell v. Streetwise Records, Ltd.*, 640 F. Supp. 575, 581 (D. Mass. 1986).

206. *See BURR*, *supra* note 24, at 806.

207. *Bell*, 640 F. Supp. at 581.

208. *Id.*

209. *Id.*

210. Copyright Act of 1976, 17 U.S.C. § 1 et. al. (1976).

maximize profits on their work is very important, especially in an age where record sales are suffering.

Amidst all of the confusion surrounding the topic, however, it is clear that there is a very real distinction between traditional and non-traditional musicians. The work for hire doctrine explicitly states that any work created within the scope of an employer-employee relationship must be found to vest the rights to the work in the employer.²¹¹ Concept groups can be found to be employer-employee relationships both using the Supreme Court's agency test in *CCNV* or by applying trademark law principles found in cases such as *Bell*.²¹² The language in the contracts entered into by these artists likely make it very clear that the creator of the group is an employer and is primarily in control of the group. Regardless of what conclusions are reached concerning traditional musicians and termination rights, concept groups are clearly a much different entity. As such, the courts should find that musicians in concept groups have no right to terminate their copyright assignment when the time finally comes.

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211. *Id.* at § 101.

212. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989); *Bell*, 640 F. Supp. at 581.

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